Supreme Court U. S.
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in the

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1292

WALKER FRANKLIN IVEY and
JAMES GILKISON

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, WALKER FRANKLIN IVEY and JAMES GILKISON, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on January 11, 1978.

OPINION BELOW

The Court of Appeals affirmed Petitioners conviction without a written opinion. However, the written notice as well as the denial of the Petition for Rehearing and Hearing en banc is printed in the Appendix A and B, at pp. 1 and 2, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1978, (A-1). A timely Petition for Rehearing was denied on February 13, 1978. (A-2) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1.

Whether this Court will review for the first time whether the evidence presented was insufficient to prove the guilt of the Petitioners beyond a reasonable doubt?

2.

Whether this Court will review for the first time whether Drug Enforcement Administration (D.E.A.) Agents can stop and arrest Petitioner, James Gilkison, without possible cause and/or without any evidence that he or the vehicle he was driving had been involved in any illegal activity?

3.

Whether this Court will review for the first time whether "Exigent Circumstances" exist to permit the search of a dwelling without a search warrant on isolated property with no objective facts that destruction of contraband is imminent or that securing the property could not be done?

STATUTES INVOLVED

The Federal statutory provision involved is 21 U.S.C. 841(a) (1) and is set forth in Appendix C, infra, (p.A-3).

STATEMENT OF THE FACTS

Walker Franklin Ivey, James Gilkison and Gerald Ivey were charged in a one count indictment with possessing with the intent to distribute 200 pounds of marijuana in violation of 21 U.S.C. 841 (a)(1). The charges against Gerald Ivey were subsequently dismissed by the Court on Motion by the Government. A jury trial was held before The Honorable Joe Eaton, District Court Judge for the Southern District of Florida. Both Petitioners were convicted. Walker Franklin Ivey was sentenced to eighteen months confinement followed by a two year special parole term. James Gilkison was sentenced to twelve months confinement followed by a two year special parole term. Their joint appeal was affirmed without opinion.

The evidence presented at trial and viewed in the most favorable light for the government revealed the following. On July 23, 1976, seven D.E.A. agents began surveillance of isolated farm property. This property consisted of a farmhouse, a barn and farm land. The surveillance began at 6:00 P.M. D.E.A. Agent Peter Sarron had the sole responsibility to "eyeball" the farm. Agent Sarron was in a position approximately 500 yards from the farmhouse, 300 yards from the barn and 75 yards west of Loxahatchee Road, the only road leading to the property. (T-91) The other agents were at various points along Loxahatchee Road. Other than Agent Sarron, no other agent was in a position to observe what occurred at the farm.

Sarron was in a position that gave him an unobstructed view of the farmhouse, barn and its surrounding property. (T-92) At approximately 7:30-8:00

P.M., Sarron saw six of seven people outside the farmhouse partying. (T-93, 109) Sarron could not identify any of the people. (T-109) Also near the farmhouse were five or six vehicles. (T-93) Two of these vehicles were campers — one was an orange truck with orange camper top, and the other was an orange truck with a white top. (T-93) A green mustang was among the remaining vehicles. (T-94)

At approximately 10:15 P.M., Sarron saw two or three unidentified individuals leave the farmhouse, enter the orange and white camper truck and drive to a position approximately 200-300 yards south of the farmhouse. (T-94, 95, 109) Fifteen minutes later, he observed an airplane make a low pass over the farmhouse. (T-94,113)[1] During the first pass, this aircraft blinked its landing lights on and off several times. (T-94) The aircraft circled and made two more higher passes and then flew off in a northerly direction. (T-96) This aircraft was under surveillance but was subsequently lost by the surveillance aircraft and radar. (T-151)

After the first pass by the low flying aircraft, the orange and white camper put on its lights and drove in a zig-zag pattern in the field behind the farmhouse. (T-97) The orange and white camper stopped five or six times in the field. (T-97) After completing the zig-zag patterns, the orange and white camper turned off its lights and drove to the barn. (T-97) At the barn, the occupants of the orange and white camper made a couple of trips to the barn. (T-97) They returned to the farmhouse. (T-99)

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[1]During the motion to suppress hearing, Agent Sarron testified that he believed it was a twin engine aircraft. However at trial he was not sure how many engines it had.

There was no contact by the individuals in the orange and white camper with the orange camper. (T-99) Agent Sarron relayed his observations to the other surveillance agents. (T-98)

Agent Sarron could not recognize nor identify the people who were at the farmhouse during the party, the occupants of the orange and white camper at 10:15 P.M. to 10:30 P.M., nor the individuals who made the trips from the orange and white camper to the barn. (T-110) He did not see anything fall from the low flying aircraft nor did he see anything being picked-up out in the field behind the farmhouse. (T-109, 110)

At approximately 11:20 P.M., a single engine Cherokee 6, Number 3762W, landed at the Boca Raton airport. This was the same aircraft that D.E.A. Agent Spence had seen the day before, July 22, 1976, when Walker Franklin Ivey and another unknown male installed an extra fuel tank into it and had it fueled. (T-119) The occurrence at Fort Lauderdale, the moving of the Cherokee 6 to an unknown location as well as Agent Spence's information from another D.E.A. agent that his confidential informant advised that Ivey was involved in the "marijuana" business, prompted the surveillance on July 23, 1976 of the farm property and the Boca Raton Airport. Agent Spence had the Cherokee 6 searched. (T-142) Inside the plane were found two seats and three individuals, the extra fuel tank and some liferafts. (T-142) Agent Spence returned to his surveillance position on Lox Road and Route 441. (T-142)

At approximately 12:30 A.M., July 24, 1976, Agent Sarron observed the two campers leave the farm. The all orange camper left first followed shortly thereafter by

the same orange and white camper seen at 10:30 P.M. (T-100) Agent Sarron did not know who was driving the campers nor did he know whether the campers were carrying anything. (T-110) Sarron joined the other surveillance agents and followed both campers. (T-111) Approximately 4 miles east of the farm, on orders from Agent Spence, a marked police unit stopped the orange van. (T-143; MS-161) They arrested the driver, James Gilkison and then searched the camper and found wrapped in an orange container, 60 pounds of marijuana. (T-143) Agent Sarron and two other agents independently and simultaneously stopped the orange and white camper and arrested the driver, Walker Franklin Ivey, and his son, Gerald Ivey. (MS-67, 71) Nothing was found in the orange and white camper. (MS-67) All three persons were taken back to the farm. A warrantless search of the barn revealed 150 pounds of marijuana. (T-147,148)

The Government was also permitted to introduce testimony from informant, James Bender and D.E.A. Agent James Henderson about a proposal made by Walker Franklin Ivey between May 19, 1976 and June 10, 1976, to have Bender fly a load of marijuana from South America and drop it on the farm he had leased. Bender related that he had met Mr. Ivey in November, 1975, and Mr. Gilkison, one or two months later. (T-40) Bender was a pilot and had spoken to Ivey on May 19, 1976. (T-41) Ivey talked to Bender about bringing in marijuana. (T-41) The marijuana (approximately 1000 to 1300 pounds) was to be packed in bundles 30 pounds each, picked up in Colombia and placed in a Beagle aircraft to be brought to Ivey's farm. (T-45) On one occasion, (June 4, 1976) Ivey, Gilkison, Bender and two other men flew over Ivey's farm and simulated the dropping of

the marijuana. (T-46) On another occasion, Gilkison was introduced by Ivey as his head ground man and was to pick up the marijuana. (T-48) During May 19, 1976 and June 10, 1976, Ivey met or spoke to Bender 4 or 5 times. Gilkison was present during two. Gilkison made no statements to Bender. On June 10, 1976, after Bender told Ivey that he would not fly for Ivey, there were no more discussions about the possible trip. The next event occurred on July 22, 1976, when Spence observed Ivey at the Ft. Lauderdale Airport mentioned earlier.

REASONS FOR GRANTING THE WRIT

1.

The evidence was insufficient to prove the guilt of the Petitioners beyond a reasonable doubt.

Taking the evidence in a light most favorable to the Government, as we are requested to do under *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457 (1962), there simply was no evidence adduced proving that Ivey possessed marijuana or had dominion and control over marijuana on July 23, 1976. There was no evidence that he had knowledge that marijuana was either in the barn or in the orange camper. Likewise, there was no evidence that James Gilkison had knowledge that the orange camper or the barn contained marijuana.

Specifically, the Government proved that:

1. No marijuana or packages were being dropped from the low flying aircraft on July 23, 1976;

2. No marijuana or packages were seen being placed in the barn on July 23, 1976;

3. No marijuana, packages or persons were inside the all orange camper on July 23, 1976;

4. No contraband was found in the Cherokee 7 aircraft or the orange and white camper;

5. The Petitioners were not seen at the farmhouse, the barn or in proximity to both campers except after they were stopped and arrested;

6. Six to seven unidentified persons were seen partying at the farmhouse that evening. People were seen arriving and departing at various times between 6:00 P.M., July 23, 1976 and 1:00 A.M., July 24, 1976, leaving one woman at the farmhouse at 1:00 A.M., July 24, 1976;

7. There was 60 pounds of marijuana in the orange camper driven by James Gilkison and 150 lbs. in the barn.

8. Ivey, two months earlier, discussed a plan to import marijuana, but it had been terminated.

Since this is a circumstantial evidence case, the test for sufficiency of the evidence is whether reasonable minds could conclude that the evidence excluded every reasonable hypothesis except that of guilt. *Hall v. United States*, 286 F.2d 676, 679 (5th Cir., 1960), cert. denied, 366 U.S. 910. Petitioners contend that the Fifth Circuit did not require the Government to meet this test or it overlooked the fact that the Petitioners were not seen at the barn or on the farm that evening. Although approximately 150 pounds of marijuana was found in a barn over 100 yards from the farmhouse, the Fifth Circuit overlooked the fact that there was no evidence when it was placed there, by whom, or who had dominion and control over it. Furthermore, although 60 pounds of marijuana was found in the camper driven by James Gilkison, there was no evidence to show that he had knowledge of its presence. The Fifth Circuit overlooked the fact that there was no evidence: (1) to sh w who owned the camper driven by Gilkison; (2) that established who drove the camper to the farmhouse; and (3) to connect the camper with the events that night.

It is clear that the Fifth Circuit overlooked and failed to apply these facts to those found in *United States v. Salinas-Salinas*, 555 F.2d 470 (5th Cir., 1977). In *Salinas-Salinas*, supra, United States Customs was "looking out" for a particular truck when it was observed at 1:40 A.M. It had just crossed the International Bridge into the United States from Mexico. There was no evidence who owned the truck, who was driving the truck or why a look-out had been placed on the truck. During the course of the surveillance, the truck which was accompanied by a red Torino, was lost but was last seen going into an orange grove. When an officer turned into the grove, its headlights picked up the truck and several people scattering. In the same area was a small house, a shed behind the house and several parked cars, including the red Torino. A police officer entered the grove and spotted Hernandez, fully dressed, about 5 or 10 yards from the truck. At first he was walking and then began running into the grove. He was ordered stopped and arrested. In the course of searching for the remaining people, the agents entered the shed. The lights were on and marijuana as well as a weighing scale could be seen inside the shed from the door. The agents also found two sets of clothing — lacking only the underwear inside the red Torino. The agents went to the house and knocked on the door. A few moments later, Salinas dressed only in his underwear and T-shirt opened the door. Salinas explained that he was sleeping and that is why he did not answer the door right away. The agents also determined that Salinas' heart was beating fast. When asked did he know why the agents were there, he first said "no" and then said "maybe marijuana". He was arrested. He was also asked why the truck was in the field. Salinas said, "Probably marijuana. That's what you would look for." No one else was

apprehended. Both Hernandez and Salinas filed motions to suppress. The Government prior to trial dismissed the charges against Hernandez. On appeal Salinas attacked the search and the sufficiency of the evidence. The Salinas court did not reach the search issue since it reversed the conviction because of the insufficiency of the evidence. Application of *Salinas-Salinas* leads to the same result in the case *sub judice*.

2.

> D.E.A. Agents can not stop and arrest Petitioner, James Gilkison, without probable cause and/or without any evidence that he or the vehicle he was driving had been involved in any illegal activity.

Although the actions of the low flying airplane and the *orange-white* camper may appear suspicious to law enforcement agents, they are not sufficient facts and circumstances to warrant a prudent man in believing that a crime had been committed or was being committed to permit the arrest of James Gilkison or the search of the *orange* van. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

The *all orange* camper was stopped and its driver, James Gilkison, was arrested by D.E.A. Agents, who did not know who was driving the vehicle and had *no evidence* whatsoever that the *all orange* camper was involved in any illegal activity. Without a written opinion, it is difficult to determine the Fifth Circuit's point, however, it appears that the Fifth Circuit confused the activity on the farm by the *orange-white camper* with that of the *all orange* camper. There was no evidence to connect the *all orange* camper with the activities on the

farm. To permit the stopping of that vehicle without more, substantially erodes the Fourth Amendment protection against unreasonable searches and seizures.

The Fifth Circuit action is also contrary to United States Supreme Court's holding in *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968). In *Sibron*, supra, the arresting officer had been observing Sibron continually from 4:00 P.M. to 12:00 midnight. During this period of time, he saw Sibron conversing with six or eight persons who were known to be narcotic addicts. Later he saw Sibron enter a restaurant and speak with three more addicts. The officer did not overhear any of the conversations nor did he see anything pass between Sibron and the addicts. While Sibron was eating, the officer approached him and told him to come outside. The officer said to Sibron,"You know what I'm after." In response Sibron mumbled something and reached into his pocket. Simultaneously, the officer thrust his hand into Sibron's pocket and found three packets of heroin. Initially, the prosecution argued that the officer had probable cause to arrest Sibron, but as the Court noted at 392 U.S., pages 62, 63, 88 S.Ct. pages 1902, 1903:

> ". . . it is clear that the heroin was inadmissible in evidence against him. The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolman Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized

that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. So far as he knew, they might indeed 'have been talking about the World Series.' The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification, E.g., Henry v. United States, 361 U.S. 98, 89 S.Ct. 168, 4 L.Ed.2d 134 (1959); Johnson v. United States, 333 U.S. 10, 16-17, 68 S.Ct. 367, 370, 92 L.Ed. 436 (1948). Thus the search cannot be justified as incident to a lawful arrest.

Although *Sibron* did note that a mere stopping was not improper, it did stress that:

> "The police officer is not entitled to seize and search every person whom he sees in the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so."

There were no articulable facts for the D.E.A. Agents to connect the unknown driver of the *all orange* camper

with the activities at the farm or that differentiated the vehicle from the others seen on the farm and that left without being stopped. The agents did not stop the vehicles to question, they stopped the vehicles for the sole purpose of arresting its occupants. This arrest and subsequent search was contrary to the Fourth Amendment and its fruits should have been suppressed.

3.

"Exigent Circumstances" do not exist to permit the search of a dwelling without a search warrant on isolated property with no objective facts that destruction of contraband is imminent or that securing the property could not be done.

The Fifth Circuit's decision cannot be reconciled with this United States Supreme Court's decision in *Vale v. Louisiana,* 399 U.S. 30, 90 S.Ct. 1669 (1970).

In *Vale,* supra, this Court held that when a valid arrest is made of a person immediately outside his home a generalized belief, not based on articulable and objective facts, that someone might be inside the premises who might have destroyed the narcotic cashe was *not* sufficient to trigger an "exigent circumstance" exception to the warrant requirement.

An examination of the record clearly establishes that no such danger existed. First, there were six to seven Government Agents in the immediate area of the farm during its surveillance plus other agents at the Boca Raton area. The agents also had access to local

police which they utilized when making the stop and arrest at 12:30 A.M. Thus, there was sufficient amount of agents to secure the farm which had *one access road* and seek a search warrant after the arrest at 12:30 A.M. of the Petitioners over 4½ miles from the farm. Second, after the suspicious activities at 10:30 P.M., no efforts were made to obtain a search warrant although they had a sufficient number of personnel. Third, no efforts were made to stop and search vehicles leaving the farm until the stopping of the two campers. This is significant since it establishes that the agents were not concerned that contraband was being removed from the premises. Finally, the farm had one access road and only a woman at the farmhouse following the arrest of the Petitioners. There was *no immediate danger* of destruction of any contraband nor does the record contain any. For these reasons, the Fifth Circuit's decision is contrary to this Court's holding in Vale, supra, and serves as another basis for this Court to grant the Writ of Certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 15th day of March, 1978, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

MICHAEL J. DODDO

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5300
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WALKER FRANKLIN IVEY and JAMES GILKISON,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

(January 11, 1978)

BEFORE AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430, F.2d 966.

APPENDIX B

United States Court of Appeals
FIFTH CIRCUIT

OFFICE OF THE CLERK

February 13, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-5300 — U. S. A. -vs- Walker Franlin Ivey and James Gilkison

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ R. ADELINE BARNES
Deputy Clerk

Mr. Michael J. Doddo
Mr. Stephen M. Pave

APPENDIX C

§841. PROHIBITED ACTS A-UNLAWFUL ACTS

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controled substance;